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No. 97-1915

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DELORES FRAHM, ROYCE TERRY, GERALD COLSON, LAWRENCE WILNEFF AND CLAIRE GOLDBERG, ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED,

Petitioners,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Statutory Provision Involved

As set forth by petitioners, other than certain jurisdictional statutes, the statutory provision involved in this case is Section 404(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104(a), which is set out at petitioners' Appendix ("App.") at 39-40.

Counterstatement of the Case

This is a highly factual case, carefully evaluated and correctly decided by both the trial court that heard the evidence in a bench trial and the Court of Appeals that unanimously affirmed

the district court's thoughtful decision. Petitioners' Statement of the Case employs a selective and distorted statement of the facts to suggest that both courts found that The Equitable Life Assurance Society of the United States ("The Equitable") engaged in a concerted campaign of misrepresentations promising lifetime coverage for retiree medical benefits, but then held that the campaign did not violate The Equitable's fiduciary duty of care to participants in The Equitable's United States Employees, Managers and Agents Health Care Plan ("Plan"). Neither the evidence nor the decisions below are as described by petitioners.

Petitioners, retired insurance agents, alleged both individually and on behalf of a class that they were deprived of health benefits to which they were entitled as early retirees under the Plan. (App. 2, 15-16). More specifically, petitioners contested The Equitable's right to apply the terms of its amended health plan to them as retirees. (App. 2). As noted by the trial court and the Seventh Circuit, The Equitable's right to apply the amended health benefits program (the "CHOICE program") to retired insurance agents was set forth in the written plan instrument and the summary plan descriptions ("SPDs"), both of which expressly reserve the right to change the Plan's terms at any time. (App. 1, 16-18). Given the plain language of the Plan and the SPDs, petitioners did not appeal the trial court decision that The Equitable has a right under the Plan to apply the terms of the CHOICE program to them. (App. 2, 29).

Unable to prevail on a claim for benefits based on the terms of the Plan or the SPDs, petitioners pursued three theories—breach of bilateral contract, estoppel and breach of fiduciary duty—as the basis for their claimed entitlement to the pre-CHOICE health benefits. (App. 29). Each of these theories relied upon "misrepresentations" allegedly made to petitioners about the Plan. *(Id.)*. After carefully considering these theories, both the trial court and the Seventh Circuit rejected them as class claims and found that, as to the individual plaintiffs, the claims

had no merit. (App. 3-13, 29-38). Petitioners' claims were rejected in large part because the evidence established that petitioners were not misled at all, but rather, received letters which accurately described the plan at the time and which did not conflict with clear plan documents notifying participants that benefits could change at any time. (App. 6-10, 33, 37).

Comfortable that "The Equitable did not set out to deceive or disadvantage plan participants," the Seventh Circuit found that The Equitable did not breach its fiduciary duties. Based on the complete trial record, both the trial court and the Seventh Circuit found that none of petitioners' theories or evidence justified stripping The Equitable of its right to change the Plan. (App. 1-38).

Reasons Why The Petition Should Be Denied

I. Petitioners Mischaracterize The Seventh Circuit's Decision In *Frahm*.

Throughout their Petition, petitioners mischaracterize the Seventh Circuit decision. In their Statement of the Case, petitioners distort the factual findings of the trial court that were accepted by the Seventh Circuit, selectively highlighting facts that they believe support their assertion that The Equitable engaged in a concerted campaign of misstatements about retiree medical benefits. At the same time, petitioners conveniently ignore the ample evidence that The Equitable provided numerous written statements informing participants about the possibility of plan amendments, that the alleged misrepresentations were accurate at the time made and that The Equitable provided proper training to its benefits personnel. Similarly, petitioners' Reasons for Granting the Writ not only further distort the factual findings of trial court and the Seventh Circuit, but also grossly mischaracterize the legal conclusions of the Seventh Circuit.

Petitioners suggest that the Seventh Circuit rejected the principle that an ERISA fiduciary owes a duty of care to plan participants and beneficiaries in communicating with them about benefits. To the contrary, the Seventh Circuit explicitly recognized that principle and correctly applied the legal rule to the evidence.

A. Petitioners Mischaracterize The Factual Findings To Create The Appearance That The Equitable Engaged In A Concerted Campaign Of Misinformation About Retiree Medical Benefits.

Contrary to petitioners' assertion, this simply is not a case in which plan managers were allowed to drain the meaning from the disclosure requirements of ERISA through "capricious misstatements and misrepresentations." (Pet. at 15). Nor is this a case in which a "wide range of responsible individuals at Equitable acting as fiduciaries – from the president on down—said in concert that petitioners' health benefits would not change after their retirement." (Pet. at 9). In so asserting, petitioners blatantly ignore the evidence accepted and relied upon by the trial court and the Seventh Circuit in rejecting their claims.

Specifically, petitioners point to assurances purportedly made to them "before their retirement" to the effect that early retirement would "freeze" or "lock-up" the superior benefits of the pre-CHOICE health plan. (Pet. at 3-4). What the district court in fact found and the Court of Appeals affirmed is that letters to four of the six plaintiffs did *not* say that benefits were "locked in," one plaintiff received no letters at all and only one plaintiff received a letter referring to a "frozen" deductible. (App. 37). The district court found this evidence insufficient to prove a breach of fiduciary duty, and the Court of Appeals agreed.

Petitioners also fail to note that they were provided with written statements informing them of The Equitable's right to amend or modify the Plan at any time and instructing them to

review their Benefits Book, which contained a reservation-of-rights clause allowing amendments. (App. 22-29). In fact, many of the petitioners admitted at trial being aware of both the provision of the Plan that reserved The Equitable's right to amend or terminate plans and of prior changes made to retirees' benefits. (App. 23-29). Additionally, petitioners fail to reference a letter received by several of them well prior to their decisions to retire saying that The Equitable's decision not to apply the CHOICE plan to retired agents was "not cast in stone." (App. 33). Given that petitioners, who were experienced insurance agents, received SPDs and other writings warning them of The Equitable's right to change the Plan, petitioners' attempt to paint a portrait of themselves as uninformed plan participants who were duped into believing that their health benefits could not be changed after their retirement simply was not credible to the trial judge.

Equally disingenuous is petitioners' failure to disclose that both the trial court and Seventh Circuit ruled that the alleged misrepresentations about "lifetime" benefits and "frozen" costs were accurate statements at the time they were made. In fact, the district court found that "all of the letters upon which the petitioners rely were accurate descriptions of the health care plan as it existed at the time." (App. 33). The Seventh Circuit as well found that communications received were "technically accurate." (App. 8). Taken as a whole, the evidence credited by the trial court and the Seventh Circuit demonstrates an environment replete with written warnings about The Equitable's ability to modify the Plan. In explanation of this environment (and in another finding ignored by petitioners), both courts noted that The Equitable adequately trained its benefits staff to give correct advice. (App. 6, 37).

The list of key evidence accepted by the courts below and disregarded by petitioners in their Petition is disturbingly long—the unambiguous statements in the plan document, the SPDs and other writings warning that The Equitable could

modify or terminate the Plan; petitioners' pre-retirement knowledge of prior modifications to the Plan; petitioners' high level of experience with insurance documents and plans; the factual accuracy of the alleged misrepresentations; the timing of many of the alleged assurances after petitioners decided to retire; and The Equitable's successful efforts to train its benefits personnel. This evidence makes it obvious that this case involves nothing more than a fact-intensive analysis to determine whether the petitioners had a contractual right to fixed benefits. The courts below simply did not find that The Equitable had mismanaged or misrepresented its benefits plan. Accordingly, the factual record does not present an occasion for this Court to decide how ERISA remedies should apply to a proven breach of fiduciary duty.

B. Petitioners Grossly Misstate The Seventh Circuit's Legal Conclusions As Holding That ERISA's Duty Of Care Does Not Apply To A Fiduciary's Communications With Participants.

In their Question Presented, petitioners assert that this Court should grant certiorari to determine whether the Seventh Circuit erred when it held in *Frahm* that the fiduciary duty of care codified by ERISA Section 404(a)(1)(B) does not include a duty to convey complete and accurate information about plan benefits. (Pet. at i). The Seventh Circuit's decision in *Frahm* does *not* present this issue for review, because the Seventh Circuit *simply does not hold,* as petitioners claim, that "there is no duty of care that attaches to a fiduciary's communications with beneficiaries." (Pet. at 7). To the contrary, the Seventh Circuit's decision in *Frahm* acknowledges that ERISA Section 404(a)(1)(B) creates a duty of care and explains that a plan administrator satisfies that duty "by taking adequate precautions—such as training the benefits staff and providing accurate written explanations—even if the precautions sometimes prove to be insufficient." (App. 9). Read for what it says (not "translated"

to manufacture an issue), the Seventh Circuit's decision in Frahm in no way turns its back on the duty of care.[1]

In asserting that the Seventh Circuit found that the duty of care does not apply to communications with beneficiaries, petitioners not only misstate the holding of the Seventh Circuit, but attempt to hide their true complaint about the decision. Despite raising a different issue in their Question Presented, petitioners' later focus on the Seventh Circuit's reasonable admonition that ERISA Section 404(a)(1)(B) does not "create a standard of absolute liability." (App. 9). Explaining its reasoning for refusing to hold employers and plan administrators liable for statements by staff that failed to qualify their description of benefits with an explanation of possible changes in the future, the Seventh Circuit stated that:

> unless [ERISA Section 404(a)(1)] is a guarantor of accurate information at all times and for the indefinite future—unless it creates not only a duty of care, but also a duty of prevision—then claims that one or another bit of advice that was misleading do not violate this statute. (App. 8).

This comment is both common sense and good law. While petitioners would have this Court believe that the Seventh Circuit has turned a blind eye to false assurances about benefit plans, in truth the Seventh Circuit has emphasized that plan administrators must satisfy ERISA's duty of care. The Seventh Circuit found that The Equitable had satisfied this duty by taking "appropriate precautions—such as training the benefits staff and

[1]Instead, the decision is consistent with other Seventh Circuit decisions that acknowledge the availability of a cause of action for breach of the duty of care when fiduciaries affirmatively mislead plan participants or remain silent in circumstances when silence could be considered misleading. *See, e.g., Schmidt v. Sheet Metal Workers' Nat'l Pension Fund,* 128 F.3d 541, 546 (7th Cir. 1997), *cert. denied,* 118 S. Ct. 1513 (1998); *Anweiler v. American Elec. Power Service Corp.,* 3 F.3d 986, 991 (7th Cir. 1993).

providing accurate written explanations." (App. 9). What the Seventh Circuit wasn't willing to do was to hold such carefully administered plans liable when such precautions "sometimes prove to be insufficient." *(Id.)*. Contrary to petitioners' attempt to convince this Court otherwise, the Seventh Circuit's decision in *Frahm* does not hold that the duty of care fails to attach to communications with plan participants, nor does it reject the availability of a cause of action for breach of the fiduciary duty of care.

C. The Seventh Circuit's Decision in *Frahm* Does Not Depart From ERISA's Preference For Written Plan Documents.

In another distortion of the Seventh Circuit's holding in *Frahm,* petitioners assert that the Seventh Circuit erroneously suggests an inconsistency between ERISA's preference for written plans and a fiduciary duty to interpret and describe plan instruments carefully and truthfully. (Pet. at 15). The Seventh Circuit's analysis was quite clear and correct on this issue. Confirming the reasonableness of not allowing "oral variances from written plans," the Seventh Circuit pointed out the "havoc" that would ensue if plan sponsors were bound by the oral advice of benefits staff. As the Seventh Circuit so rationally stated: "We do not think that § 1104(a)(1)(B) takes back with the left hand the primacy of the written word that ERISA establishes with the right hand." (App. 10).

The alleged "inconsistency" of which petitioners complain is a red herring. Like countless other courts before it, the Seventh Circuit stressed the clear congressional purpose for requiring that ERISA plans be written. In that light, the Seventh Circuit emphasized that petitioners' claims based on oral advice must be rejected for fear of undermining that scheme. The Seventh Circuit did not vary existing law, nor did it hold that ERISA's

preference for a writing means that fiduciaries have no obligation to convey truthful information to beneficiaries.

II. The Seventh Circuit Did Not Adopt An Analysis Of ERISA That Conflicts With Decisions Of This Court.

Petitioners assert that the Seventh Circuit's decision in *Frahm* "adopted a crabbed analysis of ERISA that conflicts with relevant decisions of this Court" directing the lower courts to look to the common law of trusts to define the fiduciary duties of persons responsible for administering a plan. (Pet. at 12).[2]

Contrary to petitioners' assertion, the Seventh Circuit's decision in *Frahm* does not depart from the common law of trusts in refusing to adopt a standard of absolute liability for misleading communications with plan beneficiaries or participants. Under the common law of trusts, liability is not imposed upon a trustee for breaching his duties unless the trustee intentionally or negligently fails to perform his duties. *See* Restatement (Second) of Trusts § 201 comment a ("trustee does not commit a breach of trust if he does not intentionally or negligently do what he ought not to do or fail to do what he ought to do"). Petitioners cannot establish that the common law of trusts imposes the standard of strict liability they are asking this Court to adopt. Nor does this case present evidence of intent or negligence sufficient to constitute a breach of fiduciary duty even under trust law principles.

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[2]While not an issue that warrants addressing in this case, this Court has not, as petitioners claim, created an unbending rule that trust law principles be followed in ERISA cases. In fact, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), this Court explained that courts must realize that some of the purposes of ERISA "require departing from common law trust requirements," such as the congressional "desire not to create a system so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans." *Id.* at 497.

III. There Is No Conflict Between The Circuits Over The Scope Of The Fiduciary Duty Of Care Owed To Participants And Beneficiaries Under ERISA.

Stretching to find grounds to justify their petition, petitioners fashion an argument that the Seventh Circuit's *Frahm* holding—which petitioners define as "there is no duty of care that attaches to a fiduciary's communications with beneficiaries"—conflicts with the majority of the other circuits. (Pet. at 7). Not only does the petition misstate the Seventh Circuit decision, the "conflict with seven other circuits" of which petitioners speak is nothing more than a figment of their imaginations.

The first fatal flaw in petitioners' argument lies in their tortured reading of the *Frahm* decision. As discussed above, the Seventh Circuit plainly did not hold in this case—nor has it held in any other case—that no duty of care attaches to plan administrators' communications with plan participants and beneficiaries. The second fatal flaw in this argument is that the decisions of the First, Second, Third, Eighth, Ninth, Tenth and District of Columbia Circuits, cited by petitioners as differing from the Seventh Circuit and other "minority circuits," (Pet. at 12), articulate a standard for an ERISA fiduciary's duties that is essentially the same as the decisions of the "minority circuits," defined by petitioners as the Fourth, Sixth and Seventh Circuits. In reality, *none* of these cases expresses as expansive a scope of the duty of care as that advocated by petitioners. Nor do any of *these* cases recognize any conflict in the law addressing fiduciaries' obligations under ERISA. In fact, each of the circuits relies on and incorporates the holdings of other circuits when addressing claims of a breach of ERISA's fiduciary duties. Notably, petitioners claim to have spotted a conflict not recognized by any Court of Appeals, including the Seventh Circuit panel in *Frahm*, and which petitioners never bothered to raise with the Court of Appeals in a petition for rehearing or rehearing en banc.

The gist of petitioners' argument is that other circuits have "found a fiduciary duty of care to provide complete and accurate information under ERISA § 404(a)(1)." (Pet. at 9). Petitioners argue that the Seventh Circuit, on the other hand, has "turned its back on the duty of care" (Pet. at 6) in conflict with these circuits. Petitioners' argument is based on their erroneous reading of the holding of *Frahm* and on misreading the holdings of petitioners' perceived majority and minority circuits. By latching on to *dicta* in the decisions of the First, Second, Third, Eighth, Ninth, Tenth and District of Columbia Circuits discussing plan fiduciaries' duties to provide accurate information to plan participants, petitioners imply that these decisions hold that a plan administrator will *always* be liable for providing any inaccurate or misleading information to plan participants. (Pet. at 9-11). Yet, none of these cases either expressly or implicitly advocates holding employers to the standard of strict liability that petitioners suggest.

To the contrary, the federal courts of appeals generally agree that employers breach their duty of care either by communicating false or misleading information to plan participants where the misleading statements are part of a widespread campaign to mislead participants or by engaging in gross negligence by failing to take steps to avoid misleading participants. For instance, the Third Circuit's decision in *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995), *cert. denied sub nom. Unisys Corp. v. Pickering*, 517 U.S. 1103 (1996), which petitioners cite as a "notable instance" of a case that found a fiduciary duty of care to provide complete and accurate information under ERISA Section 404(a)(1), (Pet. at 9), was premised on the court's finding that the company "affirmatively and systematically" made misrepresentations in a climate of obvious confusion by participants. 57 F.3d at 1266. Indeed, in reaching its decision in *Frahm*, the lower court relied on, rather than departed from, the Third Circuit's *Unisys* decision, in finding that the

petitioners' claims did not reflect "affirmative and systematic" misrepresentations like those in *Unisys*. (App. 37). At the same time that the Third Circuit expressed a duty of care to communicate truthfully and accurately, like the Seventh Circuit in *Frahm*, it also recognized a "policy against informal plan modification." In *Unisys*, the court warned that its decision should not be utilized to undermine the rule that, under ERISA, neither oral statements nor informal documents can modify written plan terms. 57 F.3d at 1265.

Petitioners' reliance on the Second Circuit's decision in *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5 (3d Cir. 1997), to further substantiate their claim of a split in the circuits is equally misplaced. (Pet. at 10). Petitioners describe *Becker* as a case in which the court found that a single inadequate response by a benefits counselor to inquiries about the terms of a retirement plan "violated the fiduciary duty to provide complete and accurate information." *(Id.)*. To the contrary, the Second Circuit expressly stated that its finding was based on the existence of both "materially misleading" information provided by the benefits counselor *and* deficiencies in the SPD provided to the beneficiaries. *Becker*, 120 F.3d at 10. Moreover, the Second Circuit refused to rule for plaintiffs without a showing that the misleading communication and the SPD actually caused plaintiff the harm alleged. *Id.* Thus, contrary to petitioners' characterization, the *Becker* decision does not reflect a conflicting position by the Second Circuit that a single materially misleading oral statement alone always rises to the level of a breach of fiduciary duty. Indeed, rather than conflict, this decision mirrors the Seventh Circuit's view of the importance of written plan documents, as well as its requirement that reliance on misleading statements must be shown to establish liability.

In the same vein, the decisions of the other five circuits that petitioners suggest articulate a standard of strict liability for inaccurate or misleading disclosures simply do not require any

different standard of care than the Seventh Circuit's decision. Neither the First Circuit's decision in *Vartanian v. Monsanto Co.*, 131 F.3d 264 (1st Cir. 1997), nor the Tenth Circuit's decision in *Maez v. Mountain States Tel. & Tel.*, 54 F.3d 1488 (10th Cir. 1995), suggests anything resembling a rule of strict liability for misleading or inaccurate disclosures to beneficiaries. In *Vartanian*, the First Circuit found that "lying" is inconsistent with the duty of loyalty owed by fiduciaries. 131 F.3d at 269-271. The Seventh Circuit's repeated distinction between the technically accurate statements in *Frahm* and the deception in *Varity* leads to the inescapable conclusion that, presented with the same circumstances as the court in *Vartanian*, the Seventh Circuit would reach the same holding. In the same fashion, the Tenth Circuit in *Maez* acknowledged the fiduciary duty of plan fiduciaries "not to affirmatively mislead plan participants." 54 F.3d at 1500. This is no different from the Seventh Circuit's holding in *Frahm*.

In the same vein, petitioners engage in a tortured reading of the Ninth Circuit's holding in *Barker v. American Mobil Power Corp.*, 64 F.3d 1397 (9th Cir. 1995), to suggest a split in the circuits. In that case, the Ninth Circuit relied upon the fiduciary's "affirmative misrepresentation" misleading the participants about the safekeeping of benefit funds. *Id.* at 1403. Again, an environment of affirmative misrepresentations—which the Seventh Circuit found absent in *Frahm*—led the Ninth Circuit, like other courts addressing similar circumstances, to find a breach of fiduciary duty under ERISA.

Equally inapposite is the Eighth Circuit's decision in *Shea v. Esensten*, 107 F.3d 625 (8th Cir.), *cert. denied*, 118 S. Ct. 297 (1997). Addressing a different fiduciary duty, namely ERISA's duty of loyalty, the Shea decision dealt not with allegedly misleading statements made to and relied upon by plan participants, but rather with the failure to disclose financial incentives that existed under the plan. 107 F.3d at 628-629. The Eighth Circuit said nothing different than the Seventh Circuit would have said in

similar circumstances—that when a plan administrator knows its silence regarding plan administration will be harmful, it has a duty to come forward and speak truthfully. *Id.* at 629.

The D.C. Circuit in *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747 (D.C. Cir. 1990), held comparably: when a plan administrator reasonably should have recognized a participant's special problem creating confusion as to coverage, it has a duty to inform him so as to alleviate his confusion. Nothing suggests that the Seventh Circuit would disagree. These simply were not the facts presented in *Frahm.*

In an effort to find a "minority" view (in addition to the Seventh Circuit), petitioners cite the Fourth Circuit's decision in *Faircloth v. Lundy Packing Co.*, 91 F.3d 648 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 738 (1997) and the Sixth Circuit's decision in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) *(en banc), cert. denied, mot. denied,* 141 L. Ed. 2d 170 (Jun. 8, 1998). Those decisions actually align with, rather than depart from, the holdings of the circuits characterized by petitioners as presenting a "majority" view. That is, they too hold fiduciaries liable for breach of their duties for affirmatively providing misleading or inaccurate information. *See Sprague,* 133 F.3d at 406 (noting that affirmatively providing misleading information may breach the fiduciary's duties to plan participants); *Faircloth,* 91 F.3d at 648 (acknowledging in dictum that an ERISA fiduciary may not mislead a participant or beneficiary).[3]

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[3]The petitioners' reliance on *Faircloth* is further flawed because that case did not allege misleading statements. Rather, it involved a fiduciary's failure to provide documents requested by participants to allow them to exercise an oversight role over the plan. *Faircloth,* 91 F.3d at 657. The court's analysis understandably focuses heavily on ERISA's disclosure requirements rather than on the issue suggested by petitioners as to the degree of misrepresentations necessary to establish liability. *Id.*

Rather than reflecting division among the circuits, the cases presented by petitioners show consistency among the circuits in holding ERISA fiduciaries liable where the evidence shows significant misrepresentations or misconduct. None of the cases cited by petitioners where plaintiffs prevailed presented the same circumstances as in *Frahm*, namely a well-trained benefits staff conscientiously trying to answer individual questions according to clear plan terms. Petitioners have not shown that any circuit has either intimated or expressed a breach of fiduciary duty for providing an accurate explanation of benefits but failing at every opportunity to predict future changes. Objective analysis of the cases cited by petitioners demonstrates that it is not the *legal* standard which varies in the cases cited by petitioners, but rather, the factual circumstances underlying each claim. All circuits agree that fiduciaries have a duty to communicate truthfully with plan participants. This Court need not address a conflict which does not exist.

IV. Petitioners Fail To Present Any Reason To Grant A Writ of Certiorari

Petitioners fail to present a single reason warranting further review of the Seventh Circuit's eminently reasonable, unanimous decision in *Frahm*. After a careful evaluation of written plan documents expressly reserving the right to modify the Plan, the training of the Equitable benefits staff, and the content and context of the alleged misrepresentations, the district court and the Seventh Circuit rationally concluded that The Equitable had not breached any fiduciary duty. In this context, a few contested statements about future benefit changes were insufficient in the courts' eyes to prove a breach of the fiduciary duty of care. At the same time, the Seventh Circuit stood firm in its recognition of the fiduciary obligation to communicate truthfully with plan participants. To promote that duty, the Seventh Circuit articulated

guidelines, stressing the importance of accurate written plan documents and adequate training of benefits personnel.

The Seventh Circuit's decision in *Frahm*, like the decisions of other circuits, specifically acknowledges the availability of a cause of action for a breach of the duty of care codified in ERISA Section 404(a)(1)(B) in appropriate circumstances. The Seventh Circuit's decision honors this Court's decision in *Varity* by insisting that statements deceiving and disadvantaging plan participants and beneficiaries not be tolerated. At the same time, the *Frahm* decision fosters the congressional dictate enacted in ERISA that plans not be subject to *ad hoc* oral interpretations, but rather, be administered according to written terms.

It is worth noting that this Court recently rejected a petition for writ of certiorari in a case presenting similar facts and legal theories. *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (en banc), *cert. denied, mot. denied,* 141 L. Ed. 2d 170 (Jun. 8, 1998). As in this case, *Sprague* involved claims by early retirees challenging their employer's right to modify their health care benefits, despite their receipt of plan documents informing them that the company could modify or terminate its benefit plans. *Sprague,* 133 F.3d at 395. As here, the Sprague plaintiffs claimed that their employer breached its fiduciary duties to them by making certain statements—which the courts found to be true at the time made—about lifetime coverage. *Id.* at 405. In rejecting plaintiff's breach of fiduciary duty claims, the Sixth Circuit in *Sprague*, like the Seventh Circuit in *Frahm*, noted that there is no fiduciary duty to "disclose the possibility of a future change in benefits." Id. at 406 (emphasis in original). While the Sixth Circuit, like the Seventh Circuit in *Frahm*, recognized that a breach of fiduciary duty claim would result from a campaign of affirmatively misleading information about future plans, the Sixth Circuit found no such misconduct in the case before it. *Frahm* presents no additional basis, factually or legally, for a further review of this issue.

In sum, petitioners fail to articulate a legitimate conflict of law among the circuits regarding the scope of the ERISA fiduciary duty of care. The Seventh Circuit did *not*—as petitioners assert—find that the fiduciary duty of care codified in ERISA Section 404(a)(1)(B) does not include a duty to convey accurate information to plan participants. Instead, the Seventh Circuit's decision in *Frahm* carefully evaluated the facts presented to the trial court and applied a standard mirrored by other circuits to hold, correctly, that The Equitable did not breach its fiduciary duty to petitioners. Accordingly, the petition presents neither an example of a gross miscarriage of justice nor a legal issue ripe for further review and, therefore, the petition should be denied.

Conclusion

For the reasons set forth above, we respectfully submit that the petition should be denied.

Respectfully submitted,

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